No. 01-595

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Respondent contends that the Constitution requires the prosecution to provide material exculpatory information to a criminal defendant before he pleads guilty. That position is neither required nor supported by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and it is not encompassed within *Brady*'s concern for the reliability of criminal convictions. Nor does the principle that a plea of guilty must be intelligent and voluntary support the requirement urged by respondent. In almost all cases, defendants know whether they have committed an offense; they do not need to know the weaknesses in the government's trial strategy in order for their pleas to be reliable, intelligent, and voluntary. Even if defendants had a right to receive material exculpatory information before pleading guilty, however, that right, like virtually all other constitutional rights, may be waived by a defendant wishing to plead guilty.

Respondent argues that the court of appeals' disclosure requirement is necessary to protect innocent defendants from pleading guilty. But current law

already provides extensive procedural protections to guard against that danger. When a defendant is assisted by competent counsel and a court determines after a thorough inquiry pursuant to the exacting and carefully developed standards of Rule 11 of the Federal Rules of Criminal Procedure that the plea is intelligent and voluntary, there is sufficient assurance that the defendant is pleading guilty because he is, in fact, guilty.

The rule proposed by respondent would serve an entirely different purpose and would produce unfortunate consequences. It would require the government to prepare its case and evaluate its witnesses on a defendant's timetable, allow criminal defendants to learn about the weaknesses of the government's case so that they can better calculate whether they should plead guilty or go to trial, and perhaps to share that information with co-conspirators, and it would discourage plea bargains by prosecutors. The Constitution does not require government prosecutors to assemble and disclose their cases for the purpose of assisting criminal defendants in deciding whether to plead guilty, and any such requirement would fundamentally alter the nature of the adversary system and adversely affect the criminal justice system.

A. *Brady* v. *Maryland* Does Not Require A Prosecutor To Disclose Material Exculpatory Information To A Criminal Defendant Before He Pleads Guilty

1. Brady is a fair trial right

Respondent contends (Br. 8-15) that the court of appeals' holding that a criminal defendant has a constitutional right to receive material exculpatory information before pleading guilty is supported by *Brady* v. *Maryland*, 373 U.S. 83 (1963). But *Brady* and the

decisions applying it hold no more than that the government has a duty to disclose exculpatory information when such disclosure is necessary to ensure a fair trial. *Brady*, 373 U.S. at 87-88; Gov't Br. 10-14 (discussing cases applying *Brady*). Because a criminal defendant who pleads guilty waives his right to a trial, the prosecutor's duty to disclose material exculpatory information under *Brady* never arises in the guilty plea context. And waiving the right to trial implicitly waives the right to information that the Court has found necessary to a fair trial. *Orman* v. *Cain*, 228 F.3d 616, 617 (5th Cir. 2000) ("*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty."); *Matthew* v. *Johnson*, 201 F.3d 353, 360 (5th Cir.) ("The prosecutor's duty to disclose material exculpatory information * * * exists to ensure that the accused receives a fair trial, i.e., that an *impartial party's* assessment of the defendant's guilt is based on all the available evidence."), cert. denied, 531 U.S. 830 (2000).

Respondent's observation (Br. 14) that *Brady* applies to sentencing proceedings does not alter that conclusion. The right to a fair *trial* embraces not only contested issues of guilt, but also contested issues concerning punishment. *Brady*, 373 U.S. at 87-88. It does not embrace a proceeding in which a defendant chooses to admit guilt and waives a trial. *United States* v. *Agurs*, 427 U.S. 97, 104 (1976) ("the holding in *Brady*" is based on "a concern that the suppressed evidence might have affected the outcome of the trial").

2. Disclosure of material exculpatory information is not necessary to ensure the reliability of a guilty plea

a. Contrary to respondent's contention (Br. 8-9), the policies underlying *Brady* do not support the significant extension of *Brady* to the guilty plea context. The purpose of *Brady* enunciated repeatedly by this Court is to guard against the risk that an innocent defendant will be found guilty because the government withheld evidence. *E.g.*, *United States* v. *Agurs*, 427 U.S. 97, 112 (1976) (*Brady*'s "overriding concern" is with the "justice of the finding of guilt"); Gov't Br. 11-12. When a defendant pleads guilty with the assistance of counsel, and the court accepts the plea after taking steps to ensure its validity, there is no serious risk of that happening.

Except in the most unusual circumstances, a defendant who is assisted by competent counsel knows whether he has committed the charged offense. He does not need access to the government's files to make that determination. That does not mean that a guilty plea is "foolproof" or that it holds "no hazards for the innocent." *Brady* v. *United States*, 397 U.S. 742, 757-758 (1970). An innocent defendant may plead guilty because he lacks knowledge about the nature of the offense or the consequences of the plea, because he is incompetent, or because he is coerced. Before accepting a guilty plea, a district court therefore must take steps to ensure that the plea does not result from those factors. *Boykin* v. *Alabama*, 395 U.S. 238, 244 (1969); see also Rule 11 of the Federal Rules of Criminal Procedure. But once a district court takes those steps, there is no reason to question the reliability of the plea or the resulting finding of guilt. At that point, a court

may accept as reliable the defendant's sworn assertion that "he actually committed the crime[]," and that "he is pleading guilty because he is guilty." *United States* v. *Hyde*, 520 U.S. 670, 676 (1997).

Respondent asserts (Br. 9-11) that there remains a serious risk that innocent defendants will plead guilty in order to obtain a more lenient sentence and that disclosure of exculpatory information is necessary to counteract that risk. But this Court has rejected the premise of that claim. In *Brady* v. *United States*, 397 U.S. at 758, the Court expressed its confidence in the reliability of guilty pleas where the defendant is assisted by competent counsel and the court assures itself of the voluntariness and intelligence of the plea:

> We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.

In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978), the Court reiterated that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation." Respondent offers no evidence to the contrary that would justify a new constitutional rule requiring the prosecutor to

develop and disclose material exculpatory information to all defendants before they plead guilty.

b. As respondent notes (Br. 32), in rare cases, a defendant may not know whether he is guilty because a fact that is crucial to his guilt is outside his knowledge. A person accused of statutory rape may not know the age of a victim; a person accused of bank robbery may not know whether the bank is federally insured; a person induced to commit an offense he had no predisposition to commit may not know that the person who solicited his participation was a government agent. But in those relatively unusual cases, a defendant may be able to discover the relevant facts through a reasonable investigation or through the exercise of his discovery rights under Rule 16 of the Federal Rules of Criminal Procedure. And if he cannot, he may exercise his right to go to trial and require the government to prove its case. A defendant, after all, has neither an obligation nor a constitutional right to plead guilty. *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). Alternatively, such a defendant may tender a plea, while maintaining his innocence, a procedure that is safeguarded by the requirement that the court find "strong evidence of actual guilt" before accepting the plea. *North Carolina* v. *Alford*, 400 U.S. 25, 37 (1970).

Moreover, whatever the prosecutor's obligations may be in cases in which the prosecutor knows that a defendant lacks knowledge about a fact that is crucial to his guilt, those exceptional cases cannot justify the court of appeals' holding that *every* prosecutor has a constitutional duty to disclose material exculpatory information to *all* defendants contemplating a guilty plea in *all* cases. In this case, for example, respondent knew all the facts that were necessary to establish her guilt. She had no need to know whether the government

possessed material exculpatory information in order to enter a reliable plea. When defendants know whether they have committed the charged offense, there is no sound basis for arguing that disclosure of material exculpatory evidence is necessary to ensure the reliability of a plea.*

c. The court of appeals' materiality standard demonstrates that its disclosure rule is not even designed to ensure the reliability of a guilty plea. The court of appeals did not define materiality by reference to whether the undisclosed information would undermine confidence in the reliability of the plea. See *United States* v. *Bagley*, 473 U.S. 667, 678 (1985) ("Consistent with 'our overriding concern with justice of the finding of guilt,' a constitutional error occurs [under *Brady* v. *Maryland*], and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."). Instead, the court defined materiality by reference to whether the information would be reasonably likely to lead a defendant to reject a plea and go to trial. Pet. App. 15a. The court of appeals' disclosure rule is therefore aimed at assisting criminal defendants in making a strategic choice about whether to plead guilty or go to trial; it does not serve to ensure that guilty pleas are reliable. Accordingly, the court of appeals' rule has no grounding in *Brady*'s "overriding concern"

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* Respondent advances the post hoc extra record speculation (Br. 33 n.20) that it is "extremely unlikely" that she had actual knowledge that the substance secreted in her vehicle was marijuana. But respondent admitted under oath at her plea hearing that she knew there was marijuana in the vehicle, J.A. 26, and respondent offers no new evidence that would contradict that sworn statement.

with "the justice of the finding of guilt." *Agurs*, 427 U.S. at 112.

3. The prosecutor's unique role is not implicated here

For similar reasons, the court of appeals' disclosure rule is not supported (Resp. Br. 13) by *Brady*'s focus on the prosecutor's unique role as the representative of a sovereignty whose interest "is not that it shall win a case, but that justice shall be done." *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995). A prosecutor's interest in ensuring that justice is done does not extend to assisting defendants in making strategic choices about whether to plead guilty. The imposition of such a duty would "displace the adversary system" and "would entirely alter the character and balance of our present systems of criminal justice." *Bagley*, 473 U.S. at 675 & n.7.

Nor can the extension of *Brady* to the defendant's deliberations on whether to plead guilty be justified (Resp. Br. 13) by a desire to remove a prosecutor's incentive to withhold evidence so that the prosecutor can secure such a plea. To the extent that respondent is arguing that, absent a duty to disclose material exculpatory information, prosecutors will attempt to induce defendants to plead guilty even when they possess evidence that definitively demonstrates that the defendant is innocent, that suggestion improperly presumes that prosecutors will act in bad faith. *United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995). "[T]radition and experience justify [the] belief that the great majority of prosecutors will be faithful to their duty." *Newton* v. *Rumery*, 480 U.S. 386, 397 (1987) (plurality opinion). Accordingly, "in the absence of clear evidence to the contrary, courts presume that they have properly dis-

charged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

To the extent that respondent is relying on the notion that there is something inherently illegitimate about a prosecutor's effort to induce a guilty defendant to plead guilty, this Court has rejected that suggestion. "[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Bordenkircher*, 434 U.S. at 364.

B. A Defendant May Enter An Intelligent And Voluntary Plea Without Obtaining Material Exculpatory Information From The Government

There is likewise no merit to respondent's contention (Br. 15-22) that receipt of material exculpatory information is necessary to ensure that a plea is intelligent and voluntary.

1. Knowledge of the potential weaknesses in the government's case is not a prerequisite for an intelligent and voluntary plea

In *Brady* v. *United States*, the Court expressly rejected the view that a guilty plea is not intelligent and voluntary unless the defendant has been made aware of the weaknesses in the government's case. "We find no requirement in the Constitution," the Court stated, "that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." 397 U.S. at 757. In *McMann* v. *Richardson*, 397 U.S. 759 (1970), the Court reiterated that same fundamental

point. The Court emphasized that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case." *Id.* at 769.

Brady v. *United States* and *McMann* thus establish that defendants may not attack a plea as unintelligent or involuntary based solely on the ground that they "misjudged the strength of the Government's case." *Bousley* v. *United States*, 523 U.S. 614, 619 (1998). Respondent argues (Br. 26-28) that *Brady* v. *United States* and *McMann* do not foreclose the Ninth Circuit's holding that receipt of material exculpatory information is necessary to ensure that a plea is intelligent and voluntary. But respondent's argument in that regard fails to address the core statements from those decisions quoted above.

Relying on *Menna* v. *New York*, 423 U.S. 61, (1975) (per curiam), respondent argues (Br. 29) that *Brady* v. *United States*, and the cases applying it, do not foreclose claims that are "logically inconsistent with the valid establishment of factual guilt." Respondent then takes that concept one step further in order to claim that the failure to disclose material exculpatory evidence to a defendant contemplating a guilty plea is logically inconsistent with the valid establishment of factual guilt (Br. 29). But there is no inconsistency, logical or otherwise, between a defendant's sworn assertion that he has committed a crime and the existence of exculpatory evidence in the government's files that is material only in the sense that possessing such information "would create a reasonable probability the defendant *would reject the plea agreement*" and proceed to trial. Pet. App. 15a (emphasis added).

For example, a defendant might know that he has committed an offense, but also be likely to reject a plea agreement and put the government to its proof if the only evidence tying him directly to the offense comes from witnesses and the defendant learns that those witnesses have apparent biases that could be exposed on cross-examination. In that situation, however, the existence of such impeachment evidence would not undermine in any way the reliability of the defendant's sworn admission of guilt. Similarly, in this case, the possibility that the witnesses who apprehended respondent might somehow be impeached does not undercut the reliability of respondent's sworn assertion that she knowingly imported marijuana.

2. The failure to disclose material exculpatory information is not a form of misrepresentation

Respondent similarly errs in arguing (Br. 22-23) that a prosecutor's failure to disclose material exculpatory evidence to a defendant contemplating a guilty plea amounts to a "misrepresentation" that undermines the plea. Neither the government's securing of an indictment charging a defendant with a criminal offense nor the government's willingness to enter into a plea agreement carries with it a representation that the prosecution has no material exculpatory information in its files. Instead, those actions simply communicate the government's belief that the defendant committed the offense charged in the indictment, but that the government would prefer, for any number of quite legitimate reasons, to resolve that charge through a plea rather than through a trial.

Respondent interprets (Br. 23-24) language in Justice Blackmun's separate opinion in *Bagley*, and Justice Stevens' dissenting opinion in that same case as equat-

ing a failure to disclose material exculpatory information to a form of misrepresentation. A majority of the Court, however, did not subscribe to either of those opinions, and each of the statements cited was made in the context of material that would be useful in a trial.

Moreover, Justice Blackmun treated as a misrepresentation only one particular kind of *Brady* violation—"an incomplete response to a specific request," *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.), such as a request for any inducements made to witnesses, *id.* at 683. Similarly, Justice Stevens treated as a misrepresentation "silence in the face of a specific request." *Id.* at 714 (Stevens, J., dissenting). Those opinions do not suggest that non-disclosure of material exculpatory information would amount to a misrepresentation in any other context. In particular, they do not suggest that refusal by a prosecutor to supply *Brady* information in a plea context would amount to a misrepresentation. Still less do those opinions suggest that a failure to disclose exculpatory information could be characterized as a misrepresentation where, as here, the prosecution unequivocally advises the defendant that it does not intend to provide to the defense any evidence relating to the impeachment of government witnesses or a potential affirmative defense. J.A. 14. Any effort to equate non-disclosure in the context of such a statement to a misrepresentation would stretch the meaning of the word misrepresentation beyond recognition.

3. Hill v. Lockhart is inapposite

Respondent's extended reliance (Br. 15-22) on *Hill* v. *Lockhart*, 474 U.S. 52 (1985), is misplaced. *Hill* holds that counsel's deficiency in performance before entry of a guilty plea renders the plea invalid when there is a

reasonable probability that, but for counsel's error, the defendant would not have pleaded guilty, but would have gone to trial instead. As respondent notes (Br. 16), the Court in *Hill* gave as one example of a deficiency that might invalidate a plea an error in failing to investigate or discover potentially exculpatory evidence.

Hill is based on the specific command in the Sixth Amendment that a defendant is entitled to the assistance of counsel, a command that encompasses a right to assistance from counsel in making the strategic decision about whether to plead guilty or go to trial. *Hill*, 474 U.S. at 56-57. By virtue of the Sixth Amendment "an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion). No provision of the Constitution gives a defendant a corresponding right to assistance from the government in developing a tactical strategy with respect to pleading guilty where the defendant knows that he is, indeed, guilty.

Moreover, *Hill* did not purport to overrule the Court's holdings in *Brady* v. *United States* and *McMann* that a defendant does not need to know about the weaknesses of the government's case in order to make an intelligent and voluntary plea of guilty. Yet respondent's expansive reading of *Hill* would have precisely that effect.

Respondent's observation (Br. 17-18) that the Court has analogized the prejudice standard for a *Brady* violation to the prejudice standard for a Sixth Amendment violation has no relevance here. The crucial question in this case is not what standard should be used to assess

whether a prosecution's breach of a constitutional duty has prejudiced the defense. Rather, the question here is whether the prosecution has any constitutional duty in the first place. With respect to that antecedent question, the Court has never equated the prosecution's constitutional duties with those of defense counsel. Any such equation would radically alter the adversarial nature of the criminal justice system.

C. The Court Of Appeals' Disclosure Rule Would Impose Serious Costs On The Criminal Justice System

Respondent erroneously argues (Br. 36-42) that a disclosure rule will not impose serious costs on the criminal justice system. In fact, respondent's proposed rule would endanger government witnesses and ongoing investigations; transform *Brady* into an early discovery rule, requiring the rearrangement of prosecutorial resources and priorities; impose needless delays and burdens on the criminal justice system; intrude on the interest in finality of criminal convictions; and deter the government from offering plea bargains that would benefit both the defendant and the government.

1. Government witnesses and ongoing investigations would be placed in jeopardy

Federal criminal investigations very often target defendants, such as large-scale drug dealers and members of organized criminal enterprises, who pose a danger to persons who would testify against them. In those prosecutions, the government has a particularly compelling interest in protecting, for as long as possible, the identities of its witnesses. Under the court of appeals' disclosure rule, however, the government would have an obligation to disclose, long before trial, impeachment information that could reveal the identi-

ties of these witnesses. Such premature disclosure would jeopardize the safety of the witnesses. When the witnesses are informants or undercover agents involved in ongoing investigations, it would also force the government to bring investigations to an abrupt and premature end.

Respondent asserts (Br. 37) that the materiality standard adopted by the court below adequately protects the government's interests. But that standard requires the government to make the difficult predictive judgment of whether there is a "reasonable probability" that the information withheld would cause the defendant to reject the plea bargain. Under respondent's understanding of that standard (Br. 39), the government would have to disclose any "significant" impeachment information about any "significant" government witness. And respondent also advises (Br. 41) that, if the government has difficulty applying that standard, it should "err on the side of disclosure." Application of those principles would potentially place numerous ongoing investigations and witnesses at risk.

2. Defendants would be able to use Brady as a discovery and trial preparation device imposing their timetable on the government's trial preparation strategy and resources

The court of appeals' disclosure rule would also advance the time for disclosure of material exculpatory information, permitting criminal defendants to use *Brady* as a discovery device to assist trial preparation. Respondent's assertion (Br. 38) that the court of appeals' rule would not advance the time for disclosure is incorrect. Under existing law, the prosecutor must disclose material exculpatory information in time for its effective use at trial. Gov't Br. 28-29. Under the court

of appeals' rule, the prosecutor must disclose such information before entry of a guilty plea. Thus, under the court of appeals' rule, a criminal defendant need only say that he is contemplating pleading guilty in order to trigger the prosecutor's disclosure obligation. The defendant would then be free to use the information that he obtains to assist his trial preparation, effectively transforming *Brady* from a fair trial right into an early discovery and trial preparation device.

3. The government would be required to engage in burdensome trial preparation

Respondent contends (Br. 38-39) that compliance with the court of appeals' rule would not impose an undue burden on the government. But compliance with that rule would require a significant commitment of additional resources to cases that are now resolved routinely. In many cases, the government does not even begin trial preparation until it is clear that a case is going to go to trial. In that way, the government can devote its limited prosecutorial resources to the cases where they are needed most.

Under the court of appeals' rule, the government would have to undertake significant trial preparation just to secure a guilty plea. The government would have to determine who its witnesses are most likely to be; it would have to search the files of all members of the prosecution team to determine whether there is any significant impeachment material relating to those witnesses; and it would have to assess whether the material it uncovers, either individually or collectively, would be reasonably likely to lead the defendant to reject a plea and go to trial. That burden is substantial, and removes a substantial component of the value to the government of plea bargaining.

4. Criminal defendants would have a new basis for seeking to overturn final convictions

The court of appeals' rule also invites any defendant who pleads guilty and is later dissatisfied with his sentence to raise a claim that the government did not turn over some piece of information that would have led him to go to trial rather than plead guilty. Respondent argues (Br. 39) that the court of appeals' materiality standard adequately vindicates the interest in the finality of criminal convictions. But that standard does not require the defendant to show that he is actually innocent or even that the undisclosed information casts doubt on the reliability of the guilty verdict based on his plea. Instead, it simply requires the defendant to show that there is a reasonable likelihood that the information would have led him to have taken his chances at trial rather than pleading guilty. See Resp. Br. 17; Pet. App. 15a. Showing that such a tactical choice might have been made, *at that stage*, does not provide a sufficient justification for reopening a final *conviction* of a guilty defendant.

Respondent also ignores the significant costs associated with litigating such claims. Approximately 95% of federal criminal convictions are obtained by guilty plea. Gov't Br. 24. Recognizing a new ground for challenging them puts new burdens on courts that are already overworked and "inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979).

5. The government would be deterred from negotiating plea agreements that would benefit criminal defendants

If the government must disclose material exculpatory information to a criminal defendant before he

pleads guilty, it would be deterred from offering a plea bargain any time that such disclosure might endanger a witness or compromise an ongoing investigation. Moreover, if the government must essentially complete its trial preparation in order to comply with its disclosure obligations, it would have far less incentive to offer a defendant a plea. Thus, while the court of appeals' disclosure rule is intended to benefit criminal defendants, it would have the perverse effect of depriving a significant number of criminal defendants of the opportunity to obtain advantageous plea agreements.

Respondent contends (Br. 40) that there is a cost to failing to disclose material exculpatory information: Some criminal defendants may be less likely to enter into a plea agreement if the government does not agree to disclose such information. But nothing in current law prevents the government from accommodating such a defendant when it concludes that such disclosure would be in the government's interest. The problem with the Ninth Circuit's rule is that it requires the government to disclose such information as a condition for obtaining a plea, even if disclosure would endanger government witnesses, compromise ongoing investigations, or otherwise subvert the government's interests.

D. A Criminal Defendant May Waive In A Plea Agreement Any Right He May Have To Obtain Material Exculpatory Information Before Pleading Guilty

Finally, respondent errs in contending (Br. 42-47) that a criminal defendant may not waive in a plea agreement access to material exculpatory information. Even if the Court were to find that a defendant has a right to receive such information before pleading guilty, that right, like virtually all other rights, would be subject to waiver. *Mezzanatto*, 513 U.S. at 201.

Respondent contends that the right to receive material exculpatory information before pleading guilty may not be waived because it is "so fundamental to the reliability of the factfinding process." Br. 43 (quoting *Mezzanatto*, 513 U.S. at 204). But as previously discussed, the existence of some exculpatory information in the government's possession does not affect the reliability of a counseled defendant's sworn assertion that he committed the offense.

Respondent also errs in contending (Br. 45-46) that a constitutional protection may not be waived if it adds to the reliability of a guilty verdict. The right to counsel, the right to cross-examine witnesses, and the right to trial itself all enhance the reliability of a guilty verdict. Yet those fundamental constitutional protections may be waived. *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938); *Boykin* v. *Alabama*, 395 U.S. 238, 245 (1969). If a guilty defendant may constitutionally waive his Sixth Amendment right to a trial, he may surely waive any constitutional right he may have to information that might help him make the tactical decision whether to exercise that waiver.

Nor does it matter whether respondent's proposed new constitutional right is "rooted in the public interest." Resp. Br. 44. As this Court explained in *New York* v. *Hill*, 528 U.S. 110, 117 (2000), "[i]t is *not* true that any private right that also benefits society cannot be waived." To the contrary, "[i]n general '[i]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation.'" *Ibid.* Accordingly, the Court has "allow[ed] waiver of numerous constitutional protections for criminal defendants that also serve broader social interests." *Ibid.* (citing cases holding

that the right to counsel and the right to a jury trial may be waived).

There is no reason for a different outcome here. If a counseled defendant voluntarily chooses to forgo access to exculpatory information in the government's files in order to obtain the benefits of a plea, there is no constitutional basis for precluding him from doing so.

* * * * *

For the foregoing reasons, as well as those set forth in the opening brief, the judgment of the court of appeals should be reversed.

THEODORE B. OLSON
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